IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-785

JOSEPH JESSE ESPINOZA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Jesse Espinoza prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 13, 1978, which denied a Petition For a Writ of Mandamus directed to Judge John T. Copenhaver, Jr. of the United States District Court for the Southern District of West Virginia for the purpose of transfering a criminal case to the Central District of California.

OPINIONS BELOW

The Order Denying Defendant's Motion For Transfer of the United States District Court for the Southern District of West Virginia entered September 21, 1978, which is unreported, is reprinted in Appendix No. 1. The Order of the United States Court of Appeals For the Fourth Circuit filed October 13, 1978, which is unreported, is reprinted in Appendix No. 2.

JURISDICTION

The judgment of the Court of Appeals was filed October 13, 1978. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Supreme Court's holdings in Miller v. California, 413 U.S. 15 (1973) and Hamling v. United States, 418 U.S. 87 (1974), that determinations of obscenity under local community standards may be made by jurors drawing on their own knowledge of the community from which they come, render changes of venue under Rule 21(b) of the Federal Rules of

Criminal Procedure in obscenity cases inconsistent as a matter of law with the interests of justice?

2. Whether a defendant's admission that the subject material in an obscenity case is legally obscene in all federal districts removes the legal barrier to venue changes in obscenity cases when the requirements of Rule 21(b) of the Federal Rules of Criminal Procedure are otherwise satisfied?

3. Whether a district judge can refuse a defendant's offer to admit the material is legally obscene made in order to obtain a change of venue?

4. Whether the district court judge abused his discretion as a matter of law in denying the motion for change of venue in light of his finding that "the convenience of the parties and witnesses plainly preponderates in favor of a Los Angeles trial in this case and would normally overcome the initial right of the government to try this defendant in the forum in which the indictment was returned?"

RULE INVOLVED

Rule 21(b) of the Federal Rules of Criminal Procedure provides as follows:

"(b) For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

STATEMENT OF THE CASE

On August 2, 1978 the Grand Jury in the Southern District of West Virginia returned a two count indictment against petitioner Joseph Jesse Espinoza and J-E Enterprises, Inc., a California corporation. The first count alleged the defendants, in violation of Title 18, United States Code, Section 371, conspired to transport obscene matter from California to West Virginia. The second count alleged the defendants transported obscene matter from California to West Virginia, in violation of Title 18, United States Code, Sections 2 and 1465.

Petitioner Espinoza filed a Motion For Order Changing Venue which sought a transfer to the Central District of California based upon Rule 21(b) of the Federal Rules of Criminal Procedure and upon various provisions of the United States Constitution. In response to petitioner's motion, respondent[1/] filed a one sentence response:

1/ In the Court of Appeals petitioner named the district judge as the respondent in conformity with prevailing appellate practice. See Rule 21(a) of the Federal Rules of Appellate Procedure. Local Rule 14 of the Fourth Circuit prohibits the

(cont. p. 5)

"This motion is resisted in that it is without proper legal and factual basis and is contrary to the provisions of Rule 18 of the Federal Rules of Criminal Procedure and to the holding in Hamling v. United States, 418 U.S. 87 (1974)."

On September 15, 1978 petitioner's counsel flew from Los Angeles, California to Charleston, West Virginia to appear at the hearing on the motion. Petitioner, a Los Angeles resident, having previously been excused from appearing at pre-trial proceedings, did not appear. However, his counsel presented the District Court with a supplemental affidavit signed by petitioner wherein petitioner agreed, for the purpose of changing venue, that the material was legally and factually obscene. Petitioner, in his affidavit, made all the necessary constitutional waivers, and indicated that his stipulation that the materials were legally and factually obscene was made with advice of counsel.

1/ (cont. from p. 4)
naming of the judge in the petition, but the rule was not published; petitioner was therefore not aware of it at the time he filed his petition in the Fourth Circuit. In any event, respondent United States of America appeared and filed an Answer in the Fourth Circuit. Accordingly, the Government was named as the respondent herein. See Rule 21(4) of the Supreme Court.

The purpose of petitioner's supplemental affidavit was to remove the impediment to venue changes in obscenity cases -- the local community standard problem found to be insurmountable by the United States Court of Appeals for the Eighth Circuit in United States v. McManus, 535 F.2d 460 (8th Cir. 1976), cert. den. 429 U.S. 1052 (1977). The supplemental affidavit was filed in response to respondent's one sentence argument in opposition to the venue motion.

At the hearing on September 15, 1978 the District Court asked certain questions of counsel for petitioner and respondent and then took the matter under submission. At no time did anyone object to petitioner's absence, which was in accordance with a previous court order excusing him from pre-trial proceedings. Respondent did "refuse" to "accept" the offer of petitioner that the material was legally and factually obscene.

On September 21, 1978 the District Court filed its Order Denying Defendant's Motion For Transfer. In its order, the District Court ruled as follows:

"On balance, the convenience of the parties and witnesses plainly preponderates in favor of a Los Angeles trial in this case and would normally overcome the initial right of the government to try this defendant in the forum in which the indictment was returned." (Appendix No. 1, p. 6).

In making the determination that consideration of the convenience of the parties and witnesses "plainly preponderates in favor of a Los Angeles trial . . ." the District Court considered the fact that it ordered the Government to bear the cost of certain defense witnesses. (Appendix No. 1, p. 4). That is, in making the "preliminary determination" in favor of a Los Angeles trial, the District Court fully considered its order regarding the petitioner's witnesses.

However, the District Court reached its final decision not to order a transfer because a California jury would not know the community standard of the Southern District of West Virginia. The court relied upon United States v. McManus, 535 F.2d 460 (8th Cir. 1976), cert. den. 429 U.S. 1052 (1977). Furthermore, the District Court refused to accept petitioner's stipulation regarding the obscenity issue, which was made for the purpose of overcoming the "McManus local jury problem."

Petitioner then sought mandamus from the United States Court of Appeals for the Fourth Circuit to review the District Court's decision. Petitioner also sought a stay of the trial to permit orderly appellate review.

On October 13, 1978 the United States Court of Appeals for the Fourth Circuit filed its one sentence Order, which stated,

> "Upon consideration of the petition for writ of mandamus and the representation of the United States

> that it will pay the expenses of the California witnesses in travel and while necessarily in West Virginia,
>
> IT IS NOW ORDERED that the petition be, and it hereby is denied." (Appendix No. 2.)

Nowhere in its one sentence response did the Court of Appeals indicate its awarness that the District Court determined that the "convenience" standard militated in favor of a Los Angeles trial notwithstanding the District Court's order regarding the payment of the costs of certain defense witnesses.[2/]

Petitioner unsuccessfully sought a stay of the trial from Chief Justice Warren Burger pending the filing of this Petition For Writ of Certiorari. On October 13, 1978 in Espinoza v. United States, No. A-338, this Court, after receiving the application for a stay initially presented to the Chief Justice, denied the request.

Petitioner and co-defendant J-E Enterprises proceeded to trial in the United States District Court For the Southern District of West Virginia, where the jury found both of them guilty on each count of the indictment. The

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2/ It should be noted that the District Court did not order the Government to pay for the cost of all the witnesses desired by petitioner, but only those the court deemed to be necessary.

verdicts were returned on October 20, 1978, but as of the time of the filing of this Petition For Writ of Certiorari, petitioner has pending a motion for new trial.[3/]

3/ Should the motion be granted, this Petition For Writ of Certiorari will not be moot: petitioner wants the retrial in Los Angeles. Should the motion be denied, petitioner will appeal to the United States Court of Appeals For the Fourth Circuit. If that Court, or this Court, should review be granted, reverses the conviction and orders a new trial, petitioner would want the retrial in Los Angeles. Accordingly, this Court should defer ruling upon this Petition until a retrial is ordered or permanently foreclosed.

This Court should not deny the petition now in the belief that petitioner could file a new motion for change of venue. First, it is not clear whether a second motion could be filed. Second, even if a second venue motion could be filed, it is obvious it would again be denied, and the denial would again leave petitioner with very little time to seek appellate review, as with this case.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court should grant certiorari in order to resolve a major controversy relating to venue in obscenity cases which was created by ambiguities in Hamling v. United States, 418 U.S. 89 (1974). This Court's conclusion in Hamling that jurors should apply a local community standard based on their knowledge of the community has led some to believe that a change of venue in an obscenity case under Rule 21(b) is legally impossible. The United States Court of Appeals for the Eighth Circuit in United States v. McManus, 535 F.2d 460 (8th Cir. 1976), cert. den. 429 U.S. 1052 (1977) reversed an order changing venue made by the district court because of the "local jury - community standard" problem. The district court whose order was reversed had disagreed with the contrary conclusion reached by the United States District Court for the Central District of California in United States v. Elkins, 396 F.Supp. 314 (C.D. Cal. 1975).

The Court of Appeals in McManus stated at page 464,

> ". . . However, under the circumstances of this case and in view of the recent decisions of the Supreme Court that obscenity vel non must be determined on a local community standard, we have no choice but to order that this case be tried in Iowa . . . ."

Petitioner herein believes the Eighth Circuit's decision to be erroneous. This Court, with Justice Brennan dissenting, voted to deny certiorari in McManus. In McManus the defendants were willing to stipulate, for the purpose of changing venue, that Iowa witnesses would testify the material in question was obscene. Petitioner believed this should have been sufficient to obtain a transfer.

However, notwithstanding the sufficiency of this kind of stipulation, petitioner here went much further than the defendants in McManus. Here petitioner wanted to stipulate that the material was obscene, thereby removing the only possible impediment to the transfer. The Government objected and the District Court apparently believed that without the Government's agreement, the stipulation by petitioner was ineffective. The District Court's reliance upon Singer v. United States, 380 U.S. 24 (1965) was wholly misplaced. In Singer the defendant contended he had a right to compel the Government to waive a jury trial. This Court said he could not do so. Here, petitioner was not asking the

Government to give anything up. It could still put on the same case, including all the materials for whatever evidentiary value they might have. Had the Government done so, petitioner would not have contested the obscenity issue; he would have admitted the materials were obscene. That admission would not have deprived the Government of anything. The Singer case, where the Government requested the jury trial, is simply inapposite. Simply stated, the Government has no authority to block an admission to be made by a defendant.

Moreover, the desire to admit the obscenity issue was not the product of coersion, even if petitioner's desire was predicated upon the transfer to California. A defendant can admit guilt with reservations. See North Carolina v. Alford, 400 U.S. 25 (1970). The issue of coersion was not even raised by the Government in connection with the venue hearing. The District Court, apparently unaware of the Alford case, simply refused to permit the petitioner to admit the obscenity issue in order to justify its denial of the venue motion.[4/]

4/ The District Court's statement that the supplemental affidavit of petitioner offering to stipulate to the obscenity element constituted a new ground for change of venue is patently false. It raised no new ground; it was still based on Rule 21(b). It simply was responsive to the Government's reply and sought to eliminate the Government's objection to the venue change.

This Court must grant certiorari to give further consideration to an issue which cries out for resolution by this Court: May venue ever be changed in an obscenity case? This is the ideal case for resolving the issue because the District Court clearly would have granted the motion if it were not an obscenity case.

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Rule 19 of this Court's rules provides that certiorari will be considered "where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Pretrial venue rulings are reviewable by the Courts of Appeals under our legal system. See Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967), cert. den. 390 U.S. 1029 (1968). Yet in the instant case, the Court of Appeals made no attempt to review the District Court's ruling. Instead, it merely stated that because the

Government would pay for the petitioner's witnesses[5/] the petition for writ of mandamus would be denied. That fact, however, was not the basis of the District Court's decision. The payment of witness fees was considered by the District Court, but did not lead to the result reached. Rather, the District Court determined that but for the obscenity issue, venue should be changed, notwithstanding the fact that the Government would pay for certain witnesses. Thus, the Court of Appeals totally failed to deal with the issue squarely presented. Accordingly, this Court should grant certiorari to resolve the problem presented to the District Court which the Court of Appeals inexcusably ignored.

CONCLUSION

For the reasons expressed in this Petition, certiorari should be granted and the judgment of the Court of Appeals reversed. However, the decision to grant or deny certiorari should be deferred for the reasons expressed in note 3, supra.[6/]

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Petitioner

5/ A statement not entirely accurate.

6/ Petitioner will advise this Court of the status of the case as soon as it is learned whether there will be a new trial or whether a new trial is foreclosed permanently.

APPENDIX No. 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO. 78-20030

JOSEPH JESSE ESPINOZA

ORDER DENYING DEFENDANT'S MOTION FOR TRANSFER

The defendant, Joseph Jesse Espinoza, a resident of the area of Los Angeles, California, moves to transfer this obscenity case from the Southern District of West Virginia to the Central District of California under Rule 21(b) of the Federal Rules of Criminal Procedure. Rule 21(b) provides as follows:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district.

The defendant's motion is also based upon Article III, Section 2, Clause 3 of the United States Consitution, and upon the First, Fifth and Sixth Amendments.

The indictment in this case charges the defendant Espinoza and co-defendant, J-E Enterprises, Inc., a corporation, with violations of the federal obscenity laws. Count one of the indictment charges the defendant and the named corporation with conspiracy under 18 U.S.C. § 371, charging that the defendants conspired to violate 18 U.S.C. § 1465, involving interstate transportation of obscene material. Count two of the indictment charges the defendants with the substantive violation of 18 U.S.C. §1465.

Findings of Fact

In weighing the convenience of the parties and witnesses and the interest of justice, the court makes the following findings of fact:

1. The defendant, Joseph Jesse Espinoza, and his lead counsel, Roger Jon Diamond, are residents of the Central District of California. The cost to the defendant for transportation and per diem for himself and his counsel for an estimated five-day trial, including a suppression hearing with respect to three search warrants, at Charleston, West Virginia, will approximate $1,500, whereas conduct of the trial in this case in Los Angeles, California, would result in minimal transportation and per diem costs for the

defendant and his counsel.

2. The cost to defendant of his counsel's travel time to and from Charleston, West Virginia, if any additional charge therefor is in fact permissible under the defendant's arrangement with his counsel, does not appear in evidence. On the other hand, neither does the evidence indicate the worth of the lost time that would be sustained by the Government by virtue of travel time to California of two assistant United States Attorneys from this district who have prepared this case for trial.

3(a). In accordance with the court's companion order entered simultaneously herewith under Rule 17(b), the presence of 23 California and 2 Nevada witnesses is reasonably necessary to an adequate defense by the defendant in a trial in the Southern District of West Virginia of the charges contained in the indictment in this case. The transportation, witness fees and per diem costs of those 25 witnesses from California and Nevada for a trial at Charleston, West Virginia, is estimated at $15,000. On the other hand, it is estimated by the court that the costs for these same 25 witnesses in a California trial would aggregate some $2,000.

(b). Similar costs to the Government for its six witnesses for a trial of this case at Charleston, West Virginia, is estimated at $2,500, whereas trial in California for these same six witnesses, together with two assistant United States Attorneys from this district who have prepared this case, would run $4,500.

(c). Consequently, these costs to the Government (which, by virtue of the Rule 17(b) companion order entered simultaneously herewith, is to bear the cost of the defendant's 25 witnesses in addition to the Government's own witnesses and attorneys) will approximate $17,500 if the trial is held at Charleston, West Virginia, as requested by the Government, and $6,500 if held in Los Angeles, California, as requested by the defendant.

4. The location of the events likely to be in issue and of the documents and records likely to be involved are balanced as between the Southern District of West Virginia and the Central District of California.

5. Defendant, being an employee wage earner, will suffer no business disruption save for his absence from employment for a period of time that will be substantially the same whether the trial is conducted in West Virginia or California.

6. The location of a substantial majority of the witnesses in or near Los Angeles and the frequency of airline flights to and from Los Angeles make the California place of trial more readily accessible than Charleston, West Virginia.

7. This case is presently scheduled for trial in this district promptly on September 25, 1978. It is assumed that interim compliance with the provisions of the Speedy Trial Act by the Central District of California would assure a relatively prompt trial in the event of a transfer

to the Central District of California.

In view of the foregoing, the court concludes that the convenience of the parties and their counsel would be equally served whether trial is conducted in Charleston, West Virginia, or Los Angeles, California. On the other hand, it is concluded that the convenience of a substantial majority of the witnesses would be better served if trial of this case were conducted in Los Angeles, California. Further, the cost to the defendant for himself and counsel would be approximately $1,500 less and the cost to the Government would be some $11,000 less if trial of this case were held in Los Angeles, California, rather than Charleston, West Virginia.

Conclusions of Law

In order for the Government to obtain convictions in this case, it must prove that the defendants knowingly transported the materials, as alleged in the indictment, in interstate commerce for the purpose of sale or distribution; that the defendants had knowledge of the contents of the materials, and knew the character and nature of the materials; and that the materials so transported were "obscene, lewd, lascivious, or filthy." 18 U.S.C. § 1465; United States v. Cangiano, 491 F.2d 906, 910 (2nd Cir. 1974); Hamling v. United States, 418 U.S. 87, 123 (1974). In determining whether the materials in this case may constitutionally be deemed legally obscene, resort must be had to the tripartite test devised by the Supreme Court. The

basic guidelines for the trier of fact are: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the material portrays patently offensive representations or descriptions of "hard core" sexual conduct; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 (1973). The standard used to determine obscenity is the local community standard, rather than a standard national in character. Hamling v. United States, 418 U.S. 87, 105 (1974).

I.

On balance, the convenience of the parties and witnesses plainly preponderates in favor of a Los Angeles trial in this case and would normally overcome the initial right of the Government to try this defendant in the forum in which the indictment was returned. See Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240 (1964); United States v. Polizzi, 500 F.2d 856, 899-900 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975). Nevertheless, because a local community standard involving the Southern District of West Virginia must be applied, the interest of justice requires that this obscenity case remain for trial in this district before a local jury which is in a position to apply the contemporary community standard of this locality in determining whether the materials allegedly transported in interstate commerce were

"obscene, lewd, lascivious or filthy." United States v. McManus, 535 F.2d 460 (8th Cir. 1976), cert. denied, 429 U.S. 1052 (1977). The defendant's suggestion that the Government may, in its discretion, choose to utilize expert testimony in adducing proof of the obscene nature of the materials involved does not overcome this obstacle to transfer; for, as stated in Hamling, the role of the local jury is broadened in an obscenity case:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. (Emphasis supplied) 418 U.S. at 104-05.

See also United States v. Slepicoff, 524 F.2d 1244 (5th Cir. 1975).

The defendant further contends that because this case involves motion picture films, books and other similar means of communication, it embraces conduct presumptively protected by the First Amendment and must, therefore, be treated differently than cases involving other conduct. The defendant maintains that a case of this nature deserves special treatment under the venue provisions of Article III, Section 2, Clause 3 of the United States Constitution and the Sixth Amendment, and under the due process clause and equal protection afforded under the Fifth Amendment.

In this regard, the defendant asserts that this court has "no jurisdiction to try the defendant and is obligated as a matter of constitutional law to transfer the case to the Central District of California" under the venue provisions of the Constitution. The defendant states that these provisions "reflect a strong preference in favor of criminal trials in the district wherein the defendant resides and the elements of the crime substantially occurred," and maintains that the Central District of California is thus the constitutionally mandated forum for this case.

Criminal case defendants have no constitutional right to a trial in their home districts, nor does the location of a defendant's home have "independent significance in determining whether transfer to that district would be 'in the interest of justice.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245 (1964). The court is not compelled, therefore, to transfer this case to the defendant's home district on that factor alone.

As to the defendant's contention that in the instant case "the elements of the crime substantially occurred" in California, the defendant acknowledges that the congressional enactment of 18 U.S.C. § 3237 confers venue for an offense involving transportation in interstate commerce in any district from, through or into which such commerce moves. It is the defendant's position, however, that application of this statute to the case at bar is unconstitutional because the statute is in conflict with "the free speech clause of the First Amendment" and, further, that application

of this statute would be in violation of the due process and equal protection safeguards of the Fifth Amendment. The statute in question provides as follows:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be required of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.
>
> (b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district

> in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information. 18 U.S.C. § 3237.

The defendant fails to explain his reasons for suggesting that section 3237 is in conflict with the provisions of the First Amendment, and the court finds this argument to be without merit. As to the defendant's attack based upon Fifth Amendment grounds, he proposes that the exemptions available under this venue-granting statute, involving tax offenses enumerated in 18 U.S.C. § 3237(b), render the statute constitutionally infirm. The unequal application of this statute, the argument goes, is a violation of equal protection of the laws. Cf. Bolling v. Sharpe, 347 U.S. 497 (1954).

The court finds this reasoning unpersuasive. Congress has the constitutional power under the Sixth Amendment to fix venue at any place where a crime occurs. In the case of multi-district crime, Congress is authorized to enact specific venue provisions. Armour Packing Co. v. United States, 209 U.S. 56 (1908). It is true that Congress has specifically conferred, as exempt from the general provisions of section 3237, the right of defendants in criminal cases involving certain tax statutes to trial in the

defendant's home district. It is also true that once a statutory right is granted, even though not constitutionally mandated, the state or federal government may not invidiously discriminate against a protected class of individuals in conferring that right. E.g., Griffin v. Illinois, 351 U.S. 12 (1956), concerning an indigent's right to a free transcript for appeal. The defendant herein does not contend, nor can it be seriously maintained, that the class of persons to which he belongs, and to which he claims unequal treatment is afforded, is a protected class subjected to invidious discrimination. The provision contained in section 3237(b) permitting a defendant in specified tax cases the right to have venue in the district wherein he resides is grounded upon a sound rational basis, as reflected in the legislative history leading to the enactment of this provision:

> The committee believes, further, that, in the type of case covered by this bill, the acts for which the defendant is really being tried are generally committed in the district in which he resides and certainly bear little or no relationship to the place where his tax return is received. Therefore, the committee is of the view that the defendant should have the right to be tried in the district in which he resided at the time the alleged offense was committed, if he so chooses, and that this should not be a matter of discretion.

S. Rep. No 1952, 85th Cong, 2d Sess; 1958 US Code Cong & Adm News 3262.

Where the defendant is not a member of a suspect class, as in the instant case, and the legislative classification is supported by a rational basis, there exists no violation of the contitutional right to equal protection. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

The defendant's final constitutionally-based ground in support of his motion for transfer is founded on the due process clause of the Fifth Amendment. The defendant claims lack of notice with regard to the "local community standard" of this district, and thus maintains that the application of that standard to him in this case would constitute a denial of due process. The court finds this contention without merit. The Supreme Court, in the case of Roth v. United States, 354 U.S. 476, 492 (1957), addressed the issue of lack of notice and vagueness, holding that obscenity statutes, when applied according to the proper standard for judging obscenity, "do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." (Emphasis supplied) The Supreme Court has since reaffirmed that position in Hamling, 418 U.S. at 110-16, notwithstanding the Court's movement in that same case toward the application of local community standards.

II.

The court notes that the defendant was first given the opportunity, on one week's notice to his California lead counsel, Roger Jon Diamond, to argue his motion for change of venue at the same time as the hearing held September 8, 1978, on defendant's motion for continuance. The motion for continuance was based on the pressure of Mr. Diamond's trial calendar. Mr. Diamond, however, failed to appear at the hearing. Instead, the defendant himself appeared with local counsel who possessed authority to act only in routine matters of the mundane sort. The court denied the motion for continuance and the defendant advised that he was not prepared to argue any other motions. At that hearing, the court announced that all remaining pending motions, including the motion for change of venue, would be heard on September 15, 1978, falling just ten days prior to trial scheduled for September 25, 1978.

At the September 15th hearing, the defendant, having waived his right to appear at hearings on pre-trial motions, remained in California and did not attend the hearing. Present for him on this occasion were Mr. Diamond and local counsel. Mr. Diamond presented the court with an affidavit of the defendant which purports to supplement the defendant's initial affidavit filed with his motion for change of venue some two weeks earlier. In reality, the second affidavit presents an entirely fresh ground for the transfer of this case and constitues a new motion for change of venue which the court finds untimely under Rule 22 of the

Federal Rules of Criminal Procedure.[1]

Some further observations are, nevertheless, in order, inasmuch as the defendant's new motion would fail in any event. This latest motion is admittedly prompted by the defendant's justifiable fear that the court would, as it has done, reach the same result as the court in McManus. Both by defendant's second affidavit and through representations of his counsel, the defendant now offers to admit that the matterial which is the subject of the indictment in this case is legally obscene in any jurisdiction, if and only if the case is transferred to the Central District of California. Notwithstanding the defendant's offer to make this conditional admission, he persists in urging the court to transfer the case free of any such admission. Moreover, the defendant, by his counsel, advised at the hearing that:

> We don't concede that it is obscene, but we would offer to stipulate if that

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1 Rule 22, Federal Rules of Criminal Procedure, provides that "A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe." At the arraignment in this case held on August 10, 1978, the United States Magistrate ordered that all pre-trial motions on behalf of the defendant be filed with the Clerk of this Court on or before August 28, 1978.

were the basis for the objection and the basis for the court's ruling.

Furthermore, the defendant in his initial affidavit filed with his motion averred as follows:

> I had never been to West Virginia until I appeared before the Grand Jury on February 15, 1978. I do not know, nor have I ever known, what the standards of the State of West Virginia are with respect to films and books depicting sexual activities.

The court is concerned with the propriety of the defendant's offer to engage in venue bargaining with the judicial system. The court is equally concerned as to whether this offer is made by the defendant with a genuine conviction that the subject material is indeed legally obscene, for, as just noted, the defendant has recently stated under oath his lifelong unawareness of West Virginia obscenity standards. Further, his counsel insists that neither he nor the defendant concede that the material is really obscene. Consequently, the court is in substantial doubt that the conditional concession of obscenity is made in good faith. Rather, if this case were to be transferred on the basis of the defendant's proposed obscenity admission, it might well be anticipated that questions would subsequently be raised as to whether the defendant (who chose to absent himself from the hearing and, consequently, from examination) voluntarily, knowingly and intelligently made such an admission. Indeed, further inquiry as to the voluntariness of the

defendant's proposed action is apt to prove futile. The record clearly reveals that the defendant would prefer not to admit this central element of the prosecution's case and is attempting to do so only if he can thereby strike a bargain with the court. It is hardly in the interest of justice that a Rule 21(b) transfer be directed where, as here, the proposed basis for the transfer is not only suspect but carries a clear potential for the fomenting of needless litigation at the trial level and by way of post-conviction relief.

The court concludes that the interest of justice, after due consideration of the convenience of the parties and witnesses, requires that this case be retained in this district.

Additionally, it should be observed that the Government has not accepted the defendant's offer to stipulate obscenity. In upholding a prosecutor's right to oppose and thus prevent a criminal defendant's waiver of trial by jury under Rule 21(a) of the Federal Rules of Criminal Procedure, the Supreme Court stated in the case of Singer v. United States, 380 U.S. 24, 35 (1965), that:

> [A]lthough [the defendant] can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation.

It follows that a defendant possesses no absolute right to bind the Government with piecemeal admissions. In the case at bar the defendant

has offered what may be termed at most a conditional admission which the Government is free to accept or reject. It appears from the record that the Government has declined to accept the defendant's offer. Under the circumstances of this case, the Government is justified in exercising its right to so decline.

It is, accordingly, ORDERED that the defendant's request that this case be transferred from the Southern District of West Virginia to the Central District of California be, and the same hereby is, denied.

It is further ORDERED that this order and the record of the hearing with respect thereto be sealed until further action by the court.

The Clerk of this court is directed to serve only upon counsel of record and the defendant certified copies of this order.

ENTER: September 21, 1978

(John T. Copenhaver, Jr.)
JOHN T. COPENHAVER, JR.
United States District Judge

A TRUE COPY, certified this 21 day of Sept, 1978.

JAMES A. McWHORTER, Clerk

By (Nancy C. Low)
Deputy

APPENDIX No. 2

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1697

Filed
Oct. 13, 1978
William K. Slate II
Clerk

Joseph Jesse Espinoza,

Petitioner,

versus

Honorable John T. Copenhaver, Jr., Judge, United States District Court for the Southern District of West Virginia,

Respondent.

O R D E R

Upon consideration of the petition for writ of mandamus and the representation of the United States that it will pay the expenses of the California witnesses in travel and while necessarily in West Virginia,

IT IS NOW ORDERED that the petition be, and it hereby is, denied.

With the concurrence of Judge Winter and Judge Butzner.

(Clement F. Haynsworth, Jr.)
Chief Judge, Fourth Circuit

October 11, 1978